



**The Comptroller General
of the United States**

Washington, D.C. 20548

Wabash PL-II

Decision

Matter of: Wabash DataTech
File: B-224550
Date: February 11, 1987

DIGEST

1. Protest that awardee may have had improper access to the protester's proposed price and that awardee submitted a late modification to its best and final offer is denied where there is no evidence of an improper price disclosure and the record shows that the awardee lowered its proposed price only after discussions had been reopened.
2. Protest concerning allegedly improper reopening of discussions is dismissed as untimely where filed subsequent to the closing date for receipt of second best and final offers.

DECISION

Wabash DataTech protests the award by the Maryland Procurement Office, Fort George G. Meade, Maryland, of a contract to 3M Company under request for proposals (RFP) No. MDA904-86-R-0208. Wabash contends that the agency allowed 3M to submit a late modification of its best and final offer and that the agency improperly reopened discussions. Wabash also alleges that 3M may have had improper access to Wabash's proposed prices.

We deny the protest in part and dismiss it in part.

The solicitation contemplated the award of two, 2-year, indefinite quantity, indefinite delivery contracts for computer tape. The primary contract would be awarded to the offeror with the lowest priced, technically acceptable offer; the alternate contract would be awarded to the second lowest, technically acceptable offeror. The solicitation provided that the agency would issue delivery orders under the primary contract for as long as the delivery requirements and product specifications continued to be met. If the primary contractor should become unable to meet these requirements, delivery orders would be placed against the alternate contract.

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Following the receipt of initial proposals and the agency's technical review, the agency determined that the products offered by each of the six offerors responding to the RFP appeared not to meet one or both of two solicitation requirements. The requirements concerned tape output and dropout levels. With respect to the Wabash proposal, the agency's technical evaluators determined that the technical data furnished by Wabash indicated that the QuadPlus computer tape offered by the firm would not meet either the output or the dropout requirements. The contracting officer advised each offeror that failure to meet any solicitation requirement would render the proposal technically unacceptable and invited the offerors to confirm in writing that all solicitation requirements would be met. All offerors responded with confirmation letters.

Following another technical review, the technical evaluators informed the contracting officer of their unallayed concerns regarding the Wabash proposal. The evaluators noted that Wabash had offered computer tape at the low end of its product line and that its proposed price was substantially less than the price under the agency's existing computer tape contract. The evaluator's conclusion was that the Wabash proposal was unacceptable. The contracting officer then met with the requiring activity's technical personnel and others and discussed the Wabash proposal; it was decided that the agency could not exclude the proposal as technically unacceptable. The agency requested best and final offers on June 20, 1986, and also requested offerors to extend the time for acceptance of offers to July 31. After the submission of best and final offers, Wabash was the low offeror and 3M was second low.

After the receipt of best and final offers, the agency's technical personnel again raised the concern that the QuadPlus tape offered by Wabash would not conform to the technical requirements of the solicitation. The agency decided therefore that representatives from the contracting office and the requiring activity should visit Wabash's manufacturing plant in an effort to resolve the technical question. The agency informed all offerors by telephone on July 14 that negotiations would be reopened and that it would request new best and final offers in August. By letter dated July 29, 3M agreed, as requested, to extend its offer through August 31. In the same letter, 3M lowered its proposed prices.

Representatives from the agency visited Wabash's manufacturing plant on July 31. On the basis of the visit,

the agency's technical representatives concluded that Wabash could produce a quality product and recommended that the Wabash proposal be retained in the competitive range. The agency requested new best and final offers which, as evaluated, showed 3M as the low offeror and Wabash as second low. Hence, on September 30 the agency awarded the primary contract to 3M and the alternate contract to Wabash.

Wabash filed a protest with this Office on October 9 complaining that the agency had failed to award the primary contract to the firm on the basis of the first round of best and final offers. Wabash contends that the regulations do not permit the reopening of discussions under the circumstances of this case. Wabash also alleges that the agency improperly allowed 3M to submit a late modification of its best and final offer and that it issued the request for second best and final offers solely in an effort to cure that impropriety. Wabash speculates that 3M may have had improper access to Wabash's price proposal.

The protester's speculation that 3M may have had improper access to Wabash's price proposal is totally unsupported by the record. In this connection, both the agency and 3M firmly deny any knowledge that an improper price leak occurred. The record also makes clear that 3M submitted a modification to its best and final offer only after the agency informed it by telephone that negotiations were being reopened. In this respect, offerors have the right to change their proposals in any manner they see fit so long as negotiations remain open. Delta Electric Construction Co., B-205069, Nov. 4, 1981, 81-2 CPD ¶ 388. Thus, the protester's contention that 3M's letter to the agency of July 29 was a late modification also is without merit.

With respect to Wabash's contention that the agency did not have a valid reason for reopening negotiations, the agency argues that the allegation is untimely. We agree. Wabash's complaint concerns an alleged impropriety in the solicitation process that under our Bid Protest Regulations should have been raised prior to August 22, the closing date for receipt of the second best and final offers. 4 C.F.R. § 21.2(a)(1) (1986).

On July 31, representatives from the agency visited the protester's facility. According to the protester, the agency representatives did not discuss the protester's proposal, and in fact confirmed that there were no technical problems with the proposal. Also during the plant visit, however, the

agency informed the protester that there would be a second round of best and final offers. The protester states that its president expressed surprise that negotiations had been reopened.^{1/}

The essence of Wabash's complaint now is that the reopening of discussions was prejudicial to it. In our view, this basis for protest should have been apparent to the protester on July 31 when the agency both conducted a plant visit and indicated that it was reopening negotiations. Wabash did not raise any objection to the solicitation process, however, until after it submitted a second best and final offer and after it learned that the agency had awarded the primary contract to 3M. We therefore dismiss this basis for protest as untimely. Research Analysis and Management Corp., B-218567.2, Nov. 5, 1985, 85-2 CPD ¶ 524.

The protest is denied in part and dismissed in part.

for *Seymour E. Ebers*
Harry R. Van Cleve
General Counsel

^{1/} The protester denies learning by telephone on July 21 that negotiations had been reopened.